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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/710,744	07/30/2004	David Barkalow	HVGFLM	4743

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EXAMINER	
DONOVAN, MAUREEN C	
ART UNIT	PAPER NUMBER
1761	

DATE MAILED: 08/17/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/710,744	BARKALOW ET AL.	
	Examiner	Art Unit	
	Maureen C. Donovan	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *10 June 2005*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-35* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-35* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

DETAILED ACTION

1. This action is in response to communications: Amendment filed 10 June 2005.
2. Claims 1-35 are pending.

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

1. Claims 1-12, 17-24 and 29-35 are rejected under 35 U.S.C. 103(a) as being unpatentable over Chen, WO00/42992A2 in view of Christensen, WO 93/15116 A1. The reference and rejection are incorporated as cited against claims 1-12, 17-24 and 29-35 in the previous Office action mailed 11 March 2005.

Response to Arguments

Applicant's arguments filed 10 June 2005 have been fully considered but they are not persuasive. At page 2 of the response, applicant states that there is no motivation to combine the references of Chen and Christensen because Christensen does not disclose that it would be desirable to use the hydrolysable gums in an edible film. Furthermore the applicant states at page 3 of the response that the presence of unexpected results through the use of the hydrolysable gums shows nonobviousness. This is not deemed persuasive.

It is submitted that the motivation to combine Chen and Christensen has been already presented. The applicant has not addressed the motivation presented, therefore the argument that there is none is deemed non-substantive. In addition, Christensen teaches the use of the gums in film forming applications and also teaches that lower viscosity gums are desirable (see page 2, lines 32-35) and that the subject of the entire reference is to provide such lower viscosity gums (see page 2, lines 36-38). Therefore the argument that Christensen does not teach the use of the gums in edible films is deemed non-persuasive.

With regard to the unexpected results gained from using hydrolyzed guar gum: Currently the argument of unexpected results is non-persuasive, the applicant has not shown that the unexpected results are significant; the applicant has not compared the invention to the closest prior art; and finally, attorney arguments can not take the place of evidence.

In order to overcome an obviousness rejection with an unexpected results argument, the burden lies with the applicant to establish that the results are unexpected and significant. According to MPEP 716.02 (b) the evidence should establish that the differences between the prior art and the invention are unexpected, unobvious and of practical and significant significance. Currently showing of unexpected results has not presented any reasoning why the results are significant. There has been no evidence presented showing how significant the differences were. The specification currently reads that the invention was "not as gummy" and was "quicker to dissolve". It has not been presented however to what degree the superiority is, and whether the differences were of statistical significance.

In order for the evidence of unexpected results to have any value, the invention must be compared to the closest prior art. Currently the applicant compares a hydrolyzed guar gum to a carrageenan gum. This is not deemed to be the closest prior art. To be persuasive, the comparison should be made between hydrolyzed and non-hydrolyzed guar gum. There is nothing currently to support that the results of a comparison between the performance of hydrolyzed guar gum and carrageenan is unexpected, since non-hydrolyzed guar gum could naturally be less gummy or dissolve quicker than carrageenan.

Finally it is noted that attorney statements regarding unexpected results must be supported by appropriate affidavits or declarations. Currently there are no affidavits or declarations supporting the unexpected results argument. Furthermore it is noted that the specification does not identify the results of the invention as unexpected.

2. Claims 13,14,15,16,25,26,27 and 28 are rejected under 35 U.S.C. 103(a) as being unpatentable over Chen modified by Christensen as applied to claims 1-12, 17-24 and 29-35 above, and further in view of Leung, US patent number 6,596,298. The reference and rejection are incorporated as cited against claims 13,14,15,16,25,26,27 and 28 in the previous Office action mailed 11 March 2005.

Response to Arguments

Applicant's arguments filed 10 June 2005 have been fully considered but they are not persuasive. At page 4 of the response, applicant states that there is no motivation to combine the reference of Leung with Chen and Christensen because Leung does not disclose that the flavorings would work properly in a film composed of a different substance. Furthermore the applicant states at page 4 of the response that the presence of unexpected results through the use of the hydrolysable gums shows nonobviousness. This is not deemed persuasive.

It is submitted that motivation has been presented to combine Leung with Chen and Christensen. The applicant has not addressed the motivation presented, therefore the argument that there is none is deemed non-substantive. The fact that Leung does not teach that the flavorings would work with a hydrolysable gum would not lead one of ordinary skill in the art away from using the flavorings. It is noted that Leung does teach the use of guar gum. Leung does not "teach away" from the combination, and Leung's silence regarding the combination is not a proper basis for the argument. The applicant has not presented any reasoning why the combination of Leung with Chen and Christensen would not be expected to succeed. Furthermore, Leung's statement regarding the oils is not related at all to the use of the cooling and heating agents, since these are not oils; and the obviousness rejection was based on using these agents and not on using oils. It is also submitted that it would be within the skill of one of ordinary skill in the art to have determined the proportions of the ingredients, depending on the final flavoring effect desired.

The applicant's arguments regarding unexpected results has been addressed above.

Conclusion

3. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Maureen C. Donovan whose telephone number is (571) 272-2739. The examiner can normally be reached on 8:30-5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

MCD

KEITH HENDRICKS
PRIMARY EXAMINER